Supreme Court, U.S.
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No. 94-1313

In The

Supreme Court of the United States

October Term, 1994

GEORGE ZILICH,

Petitioner,

vs.

THOMAS J. LONGO, DAVID E. MACK, NANCY J. MARINCIC, ROSE MARIE LOVANO, JOSEPH SUSTER, MICHAEL ABELLA, and WILHELM G. SPIEGELBERG, In Their Individual Capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED (PER PETITIONER)

1. Is a City Ordinance a Bill of Attainder proscribed by Article I, Section 10 of the United States Constitution where that Ordinance enacts into law the opinion of the City Council that a former councilman intentionally violated the City's Charter and authorizes the City's law director to take whatever action is necessary – legal or otherwise – to recoup the councilman's pay?

2. Does a City Ordinance enacted against a former councilman for speaking out on matters of public concern violate, under color of law, the councilman's right of freedom of speech protected by the First Amendment of the United States Constitution?

LIST OF PARTIES

All parties in the Sixth Circuit Court of Appeals proceeding are listed in the above caption.

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TO THE HONORABLE SUPREME COURT:

Respondents Thomas Longo, David E. Mack, Nancy J. Marincic, Rose Marie Lovano, Joseph Suster, Michael Abella, and Wilhelm G. Spiegelberg, in their individual capacities, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the petitioner, George Zilich.

REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Petitioner's App. "C", 5a) is reported at 34 F.3d 359. The memorandum opinion and judgment entry of the United States District Court for the Northern District of Ohio (Petitioner's App. "E", 24a), which denied respondents' qualified immunity motion for summary judgment, is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on September 1, 1994. The Sixth Circuit denied respondents' Petition for Rehearing and Suggestion for Rehearing En Banc in an order filed November 3, 1994. Respondents question whether the Supreme Court has jurisdiction to grant petitioner's Petition for Writ of Certiorari since respondents' appeal to the Sixth Circuit Court of Appeals was an interlocutory appeal based on the District Court's denial of respondents' motion for summary judgment on the ground of

qualified immunity. It is submitted that the proper time for petitioner's appeal is after a final order by the District Court disposing of all issues in the case, as distinguished from the decision of the Sixth Circuit Court of Appeals affirming the denial of qualified immunity as to one claim and reversing the denial of qualified immunity with regard to two other claims.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 10 of the United States Constitution provides in pertinent part: "No State shall . . . pass any bill of attainder. . . . "

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech. . . . "

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law;. . . . "

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

Rule 56(c) of the Federal Rules of Civil Procedure provides, in pertinent part, that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(e) provides, in pertinent part, that "[w]hen a motion for summary judgment is made and supported as provided in this rule, . . . the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Garfield Heights Ordinance No. 112-1991 is set forth in petitioner's Appendix "F" (49a-50a). The excerpt on pages 2-3 of petitioner's Petition for Writ of Certiorari is incomplete and misleading: it quotes only the title of the ordinance.

Garfield Heights Resolution No. 54-1991 is set forth in petitioner's Appendix "G" (51a-58a), except that petitioner does not set forth Exhibits C, D, and F to said resolution. Although Exhibits C, D, and E are not necessary for the determination of the subject Petition for Writ of Certiorari, respondents reserve the right to refer to and reproduce same should the Court grant the subject Petition for Writ of Certiorari.

Relevant portions of the Ohio Revised Code, the Charter of the City of Garfield Heights, and the Codified Ordinances of the City of Garfield Heights are set forth on pages 59a-65a of the subject Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner filed this action in the United States District Court for the Northern District of Ohio, Eastern Division. Petitioner alleged, *inter alia*, that respondents violated petitioner's rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. Jurisdiction was therefore conferred on the District Court by 28 U.S.C. §§ 1331 and 1343.

Respondent Thomas J. Longo ("Longo") has been at all pertinent times the Mayor of the City of Garfield Heights ("Garfield Heights"). Respondent David E. Mack ("Mack") has been at all pertinent times the Director of Law of Garfield Heights. Respondent Wilhelm G. Spiegelberg ("Spiegelberg") was an Assistant Law Director of Garfield Heights. The other respondents are members of the Garfield Heights City Council ("Council"). Petitioner sued respondents in both their individual and official capacities; the petitioner also named Garfield Heights as a defendant.

Respondents filed a motion for summary judgment on the basis of qualified immunity with regard to the individual capacity claims against them. The District Court denied that motion with respect to three of petitioner's federal claims: (1) a claim invoking Article I, § 10 of the Constitution ("No State shall . . . pass any bill of attainder") as applied to a resolution and ordinance passed by the Council on November 11, 1991; (2) a First Amendment claim (applied to local governmental action by the Fourteenth Amendment) based on the November 11, 1991 resolution and ordinance; and (3) a First/Fourteenth Amendment claim based on alleged harassment of

petitioner prior to his leaving office as a Council member on November 10, 1991. In an interlocutory qualified immunity appeal, the Sixth Circuit Court of Appeals reversed the denial of qualified immunity with regard to the first two claims; however, the Sixth Circuit affirmed the denial of qualified immunity with regard to the First Amendment claim predicated upon alleged pre-November 11, 1991 threats or acts of physical violence.

In a Petition for Writ of Certiorari filed January 31, 1995 (Supreme Court Case No. 94-1297), respondents seek Supreme Court review of the Sixth Circuit's denial of qualified immunity with regard to the First Amendment claim predicated upon alleged pre-November 11, 1991 threats or acts of physical violence. Petitioner's Petition for Writ of Certiorari, filed February 1, 1995 (first received by respondents' counsel on February 2, 1995) in the present case (Supreme Court Case No. 94-1313) seeks Supreme Court review of the Sixth Circuit's reversal, in an interlocutory qualified immunity appeal, of the District Court's denial of qualified immunity on the Bill of Attainder claim and on the First Amendment claim based on the November 11, 1991 resolution and ordinance. As explained above, respondents question whether the Supreme Court has jurisdiction to grant a Petition for Writ of Certiorari filed by a plaintiff appealing a circuit court of appeals decision in an interlocutory qualified immunity appeal.

Petitioner was a member of the Garfield Heights Council from November 13, 1989 to November 10, 1991. Before, during, and after petitioner's term on the Council, various people inside and outside the government of Garfield Heights questioned whether petitioner had met

the residency requirement of the Garfield Heights Charter applicable to members of Council. On November 11, 1991 – the day after petitioner left office – the newly constituted Council adopted Resolution No. 54-1991, which provided, in pertinent part, as follows:

> The Mayor and this Council, on behalf of the residents of the City of Garfield Heights, join together to express their disapproval and outrage over the intentional disregard of Section 9 [residency requirement] of the Charter of the City of Garfield Heights by former Councilman George Zilich during his tenure as Councilman, and demand that he return all compensation given to him in renumeration [*sic*] for his service as Councilman because of his being in violation of this provision of the City Charter.

At the same November 11, 1991 meeting, the Council also passed Ordinance No. 112-1991, which provided, in pertinent part, as follows:

> The Law Director . . . is hereby authorized and directed to take whatever legal action is necessary to collect from former Councilman Zilich the salary he received during his term as Councilman because of former Councilman Zilich's intentional disregard and violation of Section 9 [residency requirement] of the Charter of the City of Garfield Heights.

The title of this ordinance read, in pertinent part: "AN ORDINANCE AUTHORIZING AND DIRECTING THE DIRECTOR OF LAW TO TAKE WHATEVER ACTION IS NECESSARY, LEGAL OR OTHERWISE, TO COLLECT THE SALARY RECEIVED BY FORMER COUNCILMAN GEORGE ZILICH. . . . "

Petitioner testified in his deposition that at the end of March 1990, after Council had voted down the Mayor's budget, petitioner scheduled a special meeting of the Council Finance Committee for a particular evening. Earlier on the day of the meeting, someone called petitioner and stated over the telephone: "You're a dead man, asshole. I'll see you tonight." Petitioner does not know the identity of the caller. The Finance Committee meeting was, in petitioner's words, "filled with City employees. Virtually everybody there was a City employee. They were there under the pretence that I was out to eliminate their jobs, and they were ready to kill me." However, nobody ever physically attacked petitioner.

Petitioner also testified that his wife received threatening and menacing telephone calls when he was out of town. However, petitioner's wife did not testify, and this testimony is therefore inadmissible hearsay.

Petitioner testified further that periodically during 1990 his home was vandalized, that in November 1990 his car windows were shot out, and that his car tires were slashed. He said that when he filed a police report regarding the car window incident, an unidentified police officer said these types of things would stop if petitioner would merely stop the criticisms and allegations against the Mayor and the Law Department. Petitioner's testimony regarding the alleged statement by the police officer – which does not meet the requirements of Fed. R. Evid. 801(d)(2) – constitutes inadmissible hearsay. Moreover, the alleged statement of the police officer is, in the absence of an evidentiary foundation establishing otherwise, inherently unreliable as being inadmissible speculation or gossip. The only possible evidentiary foundation

that would make the statement admissible would be testimony based on personal knowledge that the police officer was directed or authorized by one or more of the respondents to make this statement to petitioner. No such evidence exists.

Petitioner also testified that he had alienated landfill operators and trash haulers and that he was warned by several people to back off because he was dealing with the wrong people when he got involved with landfill operators and trash haulers. However, no such persons have been sued by petitioner.

The foregoing summarizes petitioner's testimony regarding evidence of alleged threats or acts of physical violence against petitioner. No evidence exists that the harassers somehow revealed their supposed connection with the government of Garfield Heights. The legal significance of the anonymous nature of the alleged harassment is discussed on pages 8-14 of the Petition for Writ of Certiorari filed by respondents on January 31, 1995 (Supreme Court Case No. 94-1297); respondents establish therein that such anonymous acts do not satisfy the "under color of" state law requirement of 42 U.S.C. § 1983.

Petitioner also relies on the deposition of Thomas Furth ("Furth"), a former Assistant Law Director of Garfield Heights. Furth testified as to meetings with respondents Longo, Mack, and/or Spiegelberg in which such scenarios as raping petitioner's wife, cutting petitioner (a reputed hemophiliac) with a knife, breaking petitioner's legs, and otherwise physically injuring petitioner were allegedly discussed. However, it is undisputed that no

such acts of physical violence against petitioner or his wife ever occurred, and no evidence exists that any of the respondents ever threatened petitioner with any such acts of physical violence.

Several factual assertions in petitioner's Petition for Writ of Certiorari lack a significantly probative evidentiary basis. For example, the allegation on page 3 of the subject Petition for Writ of Certiorari that "[t]his terror campaign was authorized by the City's Mayor, Law Director, Assistant Law Director and members of Council" is not supported by significantly probative evidence. Similarly, the conclusory statements on page 8 are unsupported by specific evidence or are otherwise misleading. Thomas Furth testified, in exceedingly general terms, that respondents Spiegelberg, Mack, and Long "indicated" to Furth "that they were carrying out their plans to deal with and intimidate George Zilich. . . . " However, Furth testified that "I don't want to say that they used the term physical harm. . . . " Furth's testimony on this matter is too vague and indefinite to constitute significantly probative evidence sufficient to defeat summary judgment. (See the discussion on pages 14-19 of the Petition for Writ of Certiorari filed by respondents on January 31, 1995 (Supreme Court Case No. 94-1297), which is incorporated herein by reference.) Furthermore, no evidence exists in the record to support the assertion on page 3 of petitioner's Petition for Writ of Certiorari that "[t]his terror campaign was authorized by . . . members of council", i.e., respondents Marincic, Lovano, Suster, and Abella.

Petitioner also asserts that the language "legal or otherwise" in the title to Ordinance No. 112-1991 meant that "[t]he campaign to destroy Petitioner personally and

politically carried the full force and effect of the law in the City of Garfield Heights. The threat to his person, property and possessions is now a matter of law." Petition for Writ of Certiorari at 4. Similarly, petitioner later alleges that the language "legal or otherwise" in the ordinance "is a clear indication that this was nothing more than another threat letting the Petitioner know that the same people who authored the prior threats and physical violence were behind this Ordinance." *Id.* at 18. However, the construction by petitioner of the phrase "legal or otherwise" in the *title* of the ordinance is totally speculative and unreasonable, especially considering the context of the ordinance. The operative part of the ordinance, which contained no "legal or otherwise" language, merely provided:

> NOW, THEREFORE, BE IT ORDAINED by Council of the City of Garfield Heights, Ohio, that:
>
> SECTION 1. The Law Director be and he is hereby authorized and directed to take whatever *legal action* is necessary to collect from former Councilman George Zilich the salary he received during his term as Councilman because of former Councilman Zilich's intentional disregard and violation of Section 9 of the Charter of the City of Garfield Heights.

Petitioner's App. "F" at 50a (emphasis added). As the Sixth Circuit Court of Appeals observed in its September 1, 1994 opinion, "the city council merely passed an ordinance authorizing the law director to go to court in order to recover amounts it considers illegally received by the plaintiff. The ordinance does not purport to confiscate or

take title to any of Zilich's property." Petitioner's App. "C" at 10a.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE ORDINANCE WAS NOT A BILL OF ATTAINDER.

The Sixth Circuit Court of Appeals correctly held that Ordinance No. 112-1991 did not constitute a Bill of Attainder within the meaning of Article I, § 10 of the United States Constitution, and the discussion of the Sixth Circuit regarding this issue (Petitioner's App. "C" at 9a-12a) is incorporated herein by reference. As the Sixth Circuit observed, *"the city council merely passed an ordinance authorizing the law director to go to court in order to recover amounts it considers illegally received by the plaintiff. The ordinance does not purport to confiscate or take title to any of Zilich's property."* Petitioner's App. "C" at 10a (emphasis added). Nevertheless, without citing any evidence of record in the present case, petitioner conjures up the following parade of horribles on page 14 of his Petition for Writ of Certiorari: "Property can be subject to liens or attachment or wages garnished merely because the legislature determines that the former legislator held office illegally. The protections of notice, hearing, and judicial trial will not be afforded." Whatever scenario petitioner is imagining, it is certainly not the fact situation of petitioner's own case.

The Court of Appeals also observed that "Plaintiff has not cited, and our research has not disclosed, a single

case in which a court has held that judging a member's qualifications constitutes a bill of attainder." Petitioner's App. "C" at 11a. "[J]udging a member's qualifications is a legislative function, not a judicial one." *Id.* at 12a. As to petitioner's argument that the Council's action occurred after petitioner left Council, the Sixth Circuit properly observed:

> Finally, the fact that the city council's action came after the plaintiff was no longer a member does not matter. A state court may decide that the city council exceeded its power under state law precisely because plaintiff was a former member. This is a matter more properly to be determined under state law. *The city council may authorize its city attorney to initiate a lawsuit against a former member of that body. It is not a proper role for federal courts to determine these local political matters under the Bill of Attainder Clause.*

Id. at 12a (emphasis added). The foregoing is the appropriate response to petitioner's request that the Supreme Court "correct [the Sixth Circuit's] misconstruction" of the Ohio Revised Code and the Charter of the City of Garfield Heights.

In discussing the Bill of Attainder issue, petitioner emphasizes the separation of powers concepts in the United States Constitution, quoting *United States v. Brown*, 381 U.S. 437 (1965). Petition for Writ of Certiorari at 15. However, *Brown* involved the Bill of Attainder Clause applicable to Congress (Art. I, § 9, cl. 3, United States Constitution), *not* the Bill of Attainder Clause applicable to the states (Art. I, § 10, United States Constitution). This distinction is important when considering the separation of powers analysis in *Brown*, which

involved an Act of Congress and referred specifically to the United States Constitution's division of "the National Government into three branches – Legislative, Executive and Judicial." 381 U.S. at 442-43. This Court has repeatedly held that the separation of powers concepts applicable to the federal government cannot be enforced by federal courts against states and their political subdivisions. "[T]he doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States." *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980). In *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937), the Court held as follows:

> The Constitution of the United States in the circumstances here exhibited has no voice on the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we were dealing with an Act of Congress. *How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.* Nothing in the distribution here attempted supplies the basis for an exception.

(Emphasis added.)

Moreover, even if petitioner's underlying Bill of Attainder claim is deemed to be valid, the respondents were entitled to summary judgment on the basis of qualified immunity because there is no clearly established law which would have lead a reasonable public official to know that the passage of the legislation was unlawful. "The doctrine of qualified immunity shields public officials . . . from damages unless their conduct was unreasonable in light of clearly established law." *Elder v.*

Holloway, 510 U.S. ___, 114 S.Ct. 1019, 1021, 127 L.Ed.2d 344, 349 (1994); *accord Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). More specifically, "*[a] plaintiff* who seeks damages for violation of *constitutional* or statutory rights may overcome the defendant official's qualified immunity only by *showing* that *those rights* were *clearly established at the time of the conduct at issue.*" *Davis v. Scherer*, 468 U.S. 183, 197 (1984) (emphasis added). Clearly established law exists only where prior case law has held that a similar official action has been held unlawful under the same legal theory being presented by the plaintiff in the present case. *Lundblad v. Celeste*, 924 F.2d 627, 628 (6th Cir. 1991) (*en banc*). There are no decisions by either the Supreme Court or the Sixth Circuit which find a legislative enactment unlawful under a Bill of Attainder analysis in any situation remotely resembling this case. In fact, there are very few cases anywhere addressing the Bill of Attainder Clause contained in Art. I, § 10 of the Constitution. One law review article notes that:

> The Supreme Court has relied on the bill of attainder clause to strike down legislative actions only four times in almost two hundred years. Academic commentary on the clause understandably has been somewhat sparse. Inattention on the part of judges and scholars has in turn led to clumsy doctrinal development, with the Court unable to supply clear principles which both explain past decisions and offer a sensible guide to future results.

Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 Va. L. Rev. 475, 475 (1984).[1] There is a complete lack of legal precedent which would have lead a reasonable public official to the conclusion that passage of legislation judging the qualifications of a council member could constitute a Bill of Attainder.

Accordingly, this Court should not grant the subject Petition for Writ of Certiorari with regard to petitioner's Bill of Attainder claim. As discussed above, it is doubtful whether the Supreme Court has jurisdiction to grant the petitioner's Petition for Writ of Certiorari since the procedural posture of the case is that of a qualified immunity interlocutory appeal, and petitioner is the plaintiff, not an individual capacity defendant, in this action. Even apart from jurisdictional issues, however, this is not a proper case for determining the applicability of Article I, § 10 of the United States Constitution. The fact situation in the present case does not even remotely trigger the Bill of Attainder Clause. Moreover, the dearth of controlling case law on the Clause would necessarily result in the

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[1] None of those four cases has any similarity to this case. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), invalidated the post-civil war practice of requiring attorneys to take loyalty oaths as a condition of retaining a license. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), invalidated a similar oath required of priests and ministers. *United States v. Lovett*, 328 U.S. 303 (1946), invalidated a Congressional enactment that three specified individuals then working for the U.S. government were barred from receiving any salary from the United States, a law which was passed as a result of the three individuals' allegedly subversive activities. *United States v. Brown*, 381 U.S. 437 (1965), invalidated a law which made it a crime for a member of the Communist Party to serve as a union officer or employee.

Court finding that respondents were entitled to qualified immunity with regard to petitioner's Bill of Attainder claim.

II. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE ORDINANCE AND RESOLUTION DID NOT VIOLATE PETITIONER'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH.

As the Sixth Circuit Court of Appeals observed in its September 1, 1994 opinion, "[t]he First Amendment is not an instrument designed to outlaw partisan voting or petty political bickering through the adoption of legislative resolutions." Petitioner's App. "C" at 13a. Moreover, "[t]he ordinance merely authorizes the law director to file a lawsuit against plaintiff. . . . [T]he ordinance contains no punishment or penalty. We therefore do not consider these two hortatory measures to violate plaintiff's First Amendment rights." *Id.* at 14a.

The excellent discussion of the Sixth Circuit Court of Appeals regarding this claim (Petitioner's App. "C" at 12a-14a) is incorporated herein by reference. Again, petitioner's conjurations that the Sixth Circuit's holding "exposes [the] property [of former legislators] to attack" (Petition for Writ of Certiorari at 18) are nothing but mere speculation not based on any evidence of record in this case. The fictional case petitioner invokes is not this case.

In addition, as discussed above, this Court may not have jurisdiction to grant the subject Petition for Writ of Certiorari since the procedural posture of this case is that

of a qualified immunity interlocutory appeal, and petitioner is the plaintiff, not an individual capacity defendant. Moreover, petitioner does not even attempt to establish that respondents are not entitled to qualified immunity as to this claim; the term qualified immunity is conspicuously absent from petitioner's discussion. Accordingly, it would not be appropriate for this Court to review the applicability of the First Amendment to Ordinance No. 112-1991 and/or Resolution No. 54-1991 of the City of Garfield Heights.

CONCLUSION

On the basis of the foregoing arguments and authorities, respondents respectfully request that the Court deny the Petition for Writ of Certiorari submitted by petitioner.

Respectfully submitted,

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